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No. 799

In The

Supreme Court of the United States

October Term, 1968

THE LOCUST CLUB OF ROCHESTER, et al,

Appellants,

vs.

THE CITY OF ROCHESTER, et al,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

REPLY TO MOTION TO DISMISS

RONALD J. BUTTARAZZI
Attorney for Appellants
Office and Post Office Address:
400 Terminal Building
Rochester, New York 14614

Daily Record Corporation
Rochester, New York
(7814)

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Questions Presented

1. Whether the Constitutional issues raised by the ordinance establishing the Police Advisory Board and procedures promulgated thereunder are substantial.
2. Whether an ordinance establishing a Board with the power to utter "findings" with reference to the use of excessive or unnecessary force of named citizens and which Board is devoid of even a legal obligation to investigate the issues; to permit the accused a public hearing; confrontation of his accuser; the power to subpoena; the right of appeal is consistent with the Bill of Rights and the Constitution of the United States.

The Issues Are Substantial

Respondents contend in their motion to dismiss the appeal that the issues are not substantial because the ordinance establishing the Police Advisory Board does not impose a "predetermined punishment", nor is there a denial of due process of law under the doctrine of *Hannah vs. Larche,* 363 U.S. 420 in that the accused is not deprived of his life, liberty and property, nor is the accused denied the equal protection of the laws.

Appellee's describe the function of the Police Advisory Board at page 11 of their motion to dismiss as follows:

> " . . . it is an impartial, irreproachable panel of lay persons receiving and investigating complaints of police brutality, making findings with respect thereto, forwarding those findings to the public officer charged with assuring the proper conduct of the municipality's policemen, and when no further action is to be taken with respect to conduct the Board determines is excessive or unnecessary under the circumstances, expressing the Board's conclusion to the community entitled to be informed of the outcome . . . "

An examination of the ordinance as a totality together with the rules and regulations promulgated thereunder, the opinion expressed by the Corporation Counsel of the City of Rochester to the Police Advisory Board itself; and the object of the inquiry demonstrate the chasm of difference that exists in the matters decided by this Court in *Hannah vs. Larche,* 363 U.S. 420 and the issues raised by the Police Advisory Board. At page 115 of the Record on Appeal to the Court of Appeals the Corporation Counsel of the City of Rochester rendered this opinion with reference to the procedures of the Police Advisory Board:

> "Will the Corporation Counsel represent individual policemen against whom a complaint is lodged is "No." We feel if the police officer desires counsel he should have his own private counsel. This opinion is consistent with our policy during the three years of this administration in regard to *criminal actions* pending against a city employee, whether police or in other divisions of the City, my office has not represented them. . . . If the *criminal act* was in fact committed it would be outside the scope of employment since the City of Rochester does not authorize the committing of crime" (Appellant's italics).

At page 77 of the Record on Appeal to the Court of Appeals the Board is also described as an alternative to the "traditional legal routes of redress". The behavior said to be controlled by the ordinance already constitutes a crime or crimes under the Statutes of the State of New York and the United States.

If the Commissioner in charge of the discipline of the police officers and other members of the police force do not act in a manner "satisfactory" to the Board, then the Board's "finding" of police brutality of a named police officer is published as rebuke to the City Fathers and the infliction of official governmental defamation of the proscribed police officer. See Section 17-24 of the Code of the City of Rochester, Volume I, Chapter 17, contained at page A34 of the Statement of Jurisdiction.

The decision in the *Hannah vs. Larche,* 363 U.S. 420 is based on the concept that the Commission does not "adjudicate". See page 442 of *Hannah vs. Larche.* Justice Frankfurter's concurring opinion at page 488 of *Hannah vs. Larche* crystallizes the disparity between the purposes of the Police Advisory Board and the Commission on Civil Rights:

> " . . . Were the commission exercising an accusatory function; were its duty to find that named individuals were responsible for wrongful deprivation of voting rights, and to advertise such finding or to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the controlling starting point for assessing the protection which the Commission's procedure provides . . . The purpose of its investigations is to develop facts upon which legislation may be based".

It is not suggested that the ordinance establishing the Police Advisory Board functions for any other governmental purpose but punishment. It's sole purpose is to adjudicate, clear and condemn. The fact finding is directed not toward future legislation but toward punishment and official denunciation. The alpha and omega of the proceeding is punitive.

The publication of an official finding that a particular police officer is guilty of police brutality can and does constitute punishment. Punishment encompasses more than fines or imprisonment. See *Kennedy vs. Mendoza,* 372 U.S. 144 at pgae 168 and *Trop vs. United States,* 356 U.S. 86, 96. In *Cummings vs. Missouri,* 71 U.S. 277 at page 320, 321, 322 the Court commented:

> "The learned counsel does not use the terms — life, liberty and property as comprehending every right known to law. He does not include under liberty freedom from outrage of the feelings as well as restraints upon the person. He does not include under property those estates which he may acquire in professions, though they are often the source of the highest emoluments and honors . . . Any deprivation or suspension of the rights for past conduct is punishment . . . "

In *New York Times vs. Sullivan,* 376 U.S. 254 at page 275 James Madison is quoted as arguing the following:

> "If we advert to the nature of the Republican Government we shall find that the censorial power is in the people over the government and not in the government over the people . . . It is not fair to say that this indiscriminate censure is not punishment. If it falls on classes or individuals it is a severe punishment." See pages 234 and 235, the Bill of Rights, Its Origin and Meaning, Brandt, (New American Library 1965).

The architects of our form of government recognized that attainder, official defamation, and censorial comment by government could be destructive of human rights and was therefore a very real form of punishment.

In his concurring opinion Justice Douglas in *Peters vs. Hobby,* 349 U.S. 331 at page 351 commented:

> "We deal here with the reputation of men and their right to work, things more precious than property itself. We have here a system that condemns a man to a suspect class and the outer darkness without the rudiments of a fair trial".

The blasting of a man's character and the destruction of his reputation does constitute a deprivation of a man's liberty.

Section 17-20 of the Code of the City of Rochester, Volume I, Chapter 17, See Appendix B, Page A33 of the Judicial Statement, provides:

> "Upon receipt of the Chief's Report, the Board, with the assistance of the staff shall make any independent investigation *it considers necessary*". (appellant's italics)

In short there is not even a legal compulsion to conduct any investigation whatsoever although a named police officer can be accused and condemned of matters involving assault and homicide by the Board. The Board is devoid of any

semblance of due process. Acting without standards and without even an investigation it can literally destroy a man's good name, and put his employment in jeopardy.

To destroy a man's reputation, to put his employment in jeopardy, to expose him to criminal prosecution and public condemnation by government, without a right to an investigation, to a public hearing, to confrontation and the power to develop his defense is not consistent with due process of law. Due process does require that the named person sought to be condemned be granted at least an investigation and a fair and public hearing. *In Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 the Court recognized a procedure resulting in official governmental condemnation is subject to the principle of due process. At pages 144 and 145 Justice Black stated:

> "Our basic law, however, wisely withheld authority for resort to executive investigations, condemnations and black lists as a substitute of legal types of penalties by courts following trial and conviction with procedural safeguards of the Bill of Rights."

Justice Frankfurter concurred and stated at page 170-171 of Anti-Facist Refugee Committee case (cited supra):

> "The heart of the matter is that democracy implies respect for the elementary rights of man, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of Rights . . . Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of rights. At least such is the conviction underlying our Bill of Rights . . . That a conclusion satisfies one's private conscience does not attest to its reliability".

A procedure in which the only investigation required is one that the Board "deems necessary"; in which no public

hearing be had; nor even in which any hearing whatsoever is required does not satisfy the requirements of the Fifth and Fourteenth Amendment of our Constitution. The assertion that the Board is made up of an impartial, irreproachable panel of citizens not only renders the stigma to the person condemned more onerous; but also the condemnation becomes more severe because it purports to have been made through an independent investigation, when, in legal fact, no such investigation was required by law nor made pursuant to the most fundamental rules of fairness.

The substitution of private consciences and secret investigations for the objective rule and standards of law is a denial of due process. Justice Frankfurter's comments in *Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 at page 171 are an appropriate answer to this procedure:

> " . . . That a conclusion satisfies one's private conscience does not attest to its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached . . . Secrecy is not congenial to truth seeking and self-righteousness gives too slender an assurance of righteousness".

The difficulty is compounded when no standard or guide whatsoever is granted to the tribunal with the power of condemnation.

No definition whatsoever is given to the Police Advisory Board as to what constitutes excessive or unnecessary force. That a man cannot and should not be punished unless he is punished under a known and existing law is a principle as old as the jurisprudence of Western man. In *Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 at page 177 Justice Douglas commented upon honorable men applying vague or unknown standards:

> "It is not enough to know that the men applying the standard are honorable and devoted men. This is a government of *laws* not of *men*. The powers being used are the powers of government over the reputations and fortunes of men."

Only the most vicious of modern tyrannies subjected its citizens to the principle that any act against the "sound feeling of the nation" should be made punishable whether there was a pre-existing law. See pages 73 and 74, Burdick, Law of Crime, (Matthew Bender 1946.)

In *Anti-Facist Refugee Committee vs. McGrath,* 341 U.S. 123 at page 180 the concurring opinion of Judge Douglas stated:

> "A disloyalty trial is the most crucial event in the life of a public servant. If condemned he is branded for life as a person unworthy of trust or confidence . . . To make that condemnation without meticulous regard to the decencies of a fair trial is abhorrent to fundamental justice."

A brutality trial is the most crucial event in the life of a police officer. If condemned he is branded for life as a person unworthy of trust or confidence. To make that condemnation without regard for the decencies of a fair trial is likewise abhorrent to fundamental justice.

In *Hannah vs. Larche,* 363 U.S. 420 at page 488, 489 Justice Frankfurter clearly distinguished the procedures and purposes of the Civil Rights Commission as contrasted to the procedures now being used by the Police Advisory Board:

> "Its investigation would be turned into a forum for the litigation of individual culpability . . . Judgments by the Commission condemning or stigmatizing individuals are not called for . . . When official pronouncements on individuals purport to rest on

> evidence and investigation, it is right to demand that those so accused be given a full opportunity for their defense in such investigation, excepting of course, grand jury investigations."

The Police Advisory Board's power is directed solely toward findings of police brutality and such judgments condemning and stigmatizing named individuals, which condemnations purport to rest on evidence and investigation, should be permitted to be made by government only after the most scrupulous procedures and safeguards are provided to the accused. However the Police Advisory Board is not even obligated to conduct any investigation whatsoever before it issues its scathing condemnations.

The punishment envisioned by the Appellees also looks toward community pressure and retaliation. The intermingling of governmental exposure with community reprisal can also result in coercion and punishment. In *N.A.A.C.P. vs. Alabama,* 357 U.S. 449 at page 463 the Court recognized that the interplay of state action together with community pressure could result in not only economic reprisal, loss of employment, physical coercion and other manifestations of public hostility resulting in serious damage to the persons deliberately exposed.

It is also suggested that the ordinance establishing the Police Advisory Board is not violative of the principle of the equal protection of the laws granted to each citizen because there is no "invidious" discrimination and that the Board is a rational way to correct the evil at hand. If the Board has no punitive power Appellants do not comprehend the manner in which the evil at hand is corrected. As a civil servant the police officer is denied not only the protection of the Charter of the City of Rochester but also his rights under the Civil Service Laws of the State of New

York; as a person accused of acts criminal in nature but resulting in extra-legal punishment, he is deprived of the standards set by the Penal Law of the State of New York and the procedural safeguards granted to any person accused of crime by both the Code of Criminal Procedure of the State of New York and the Constitution of the State of New York; as a citizen of the United States it appears to the police officer that the rights granted to citizens under the Constitution and the Bill of Rights are illusory with reference to him.

The proper mode of trial of charges of police brutality is exemplified in the trial of the soldiers and officer accused of perpetrating the Boston Massacre. The heirs of those who conducted that trial cannot and should not forget that despite public hostility; the prejudice of the press, the turmoil of the times, the accused were granted a judicial trial which could not be faulted by Tory, Rebel, nor history. Those precedures should not be forgotten.

The constitutional safeguards of the Bill of Rights are not and should not be so flexible as to apply only in tranquil times and be swept away as technicalities when the winds of turmoil sweep the land.

CONCLUSION

The jurisprudence of our Republic has not progressed to this juncture in history only to return to the practices and procedures of the Star Chamber. Appellants respectfully renew their plea that this matter be heard.

Respectfully submitted,

RONALD J. BUTTARAZZI
Attorney for Appellants
Office and Post Office Address:
400 Terminal Building
Rochester, New York 14614